

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of

Determination of Rates and Terms for
Business Establishment Services

Docket No. 2012-1 CRB
Business Establishments II



MOTION TO ADOPT SETTLEMENT

The undersigned parties (collectively, the “**Parties**”) hereby notify the Copyright Royalty Judges that a settlement has been reached concerning royalty rates and terms under Section 112(e) of the Copyright Act in the above-referenced proceeding (the “**Proceeding**”) for the royalty period January 1, 2014 through December 31, 2018. The proposed, modified rates and terms for business establishment services as agreed to among the Parties are attached hereto as **Exhibit A** (the “**Settlement Rates and Terms**”). **Exhibit B** attached hereto is marked to show the amendments that would be made to the existing regulations for business establishment services, codified at 37 C.F.R. Part 384, through the adoption of the Settlement Rates and Terms. The Parties respectfully submit the Settlement Rates and Terms for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2) and request that the Judges adopt the same as the statutory royalty rates and terms for business establishment services for January 1, 2014 through December 31, 2018.

I. Nature of the Settlement Rates and Terms

The Settlement Rates and Terms for business establishment services are the product of extensive negotiations among the Parties and are a non-precedential compromise motivated by the unique business and economic circumstances of the Parties. The Parties also agreed to the Settlement Rates and Terms to avoid the costs, risk, and uncertainties of participating in a litigated rate proceeding. The Settlement Rates and Terms carry forward the existing terms with

relatively few adjustments, and change the statutory royalty rate from 10% of gross proceeds to 12.5% of gross proceeds.

Nothing in the Settlement Rates and Terms should be understood as making any admissions or concessions with respect to any positions taken by Music Choice, Sirius XM Radio Inc., or SoundExchange, Inc. on any disputed issues before the Copyright Royalty Judges in CRB PSS/Satellite II, Docket No. 2011-1.

II. Adoption of the Settlement by the Copyright Royalty Judges


Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding.” Such an agreement may serve as the basis for statutory terms and rates if other interested parties who “would be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement,” *id.* § 801(b)(7)(A)(i), and no participant objects. *Id.* § 801(b)(7)(A)(ii).

The Parties are all of the participants in the Proceeding. As such, there is no participant objecting to the Settlement Rates and Terms. Accordingly, the Copyright Royalty Judges should adopt the Settlement in its entirety after its publication in the *Federal Register* and the receipt of any comments. 17 U.S.C. § 801(b)(7).

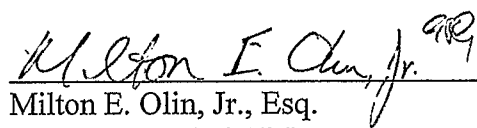
Dated: November 29, 2012

SIGNATURE PAGE FOLLOWS


Respectfully submitted,

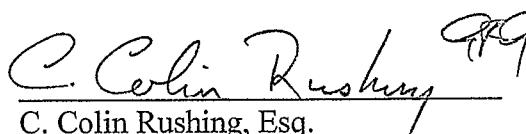

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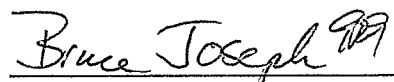
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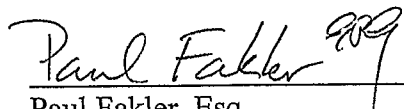

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A handwritten signature in dark ink, reading "Paul Fakler" followed by a stylized flourish or initials.

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EXHIBIT A

PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

§ 384.1 General.

(a) *Scope.* This part 384 establishes rates and terms of royalty payments for the making of Ephemeral Recordings by a Business Establishment Service, as defined in § 384.2, in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2014, through December 31, 2018 (the "License Period").

(b) *Legal compliance.* Licensees relying upon the statutory license set forth in 17 U.S.C. 112(e) shall comply with the requirements of that section, the rates and terms of this part and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to the making of Ephemeral Recordings within the scope of such agreements.

§ 384.2 Definitions.

For purposes of this part, the following definitions shall apply:

Business Establishment Service means a service making transmissions of sound recordings under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv).

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the License Period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory license under 17 U.S.C. 112(e).

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a Business Establishment Service that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a certified public accountant.

§ 384.3 Royalty fees for ephemeral recordings.

(a) *Basic royalty rate.* For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, a Licensee shall pay 12.5% of such Licensee's "Gross Proceeds" derived from the use in such service of musical programs that are attributable to copyrighted recordings. "Gross Proceeds" as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(b) *Minimum fee.* Each Licensee shall pay a minimum fee of \$10,000 for each calendar year of the License Period in which it makes Ephemeral Recordings for use to facilitate transmissions under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), whether or not it does so for all or any part of the year. These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under paragraph (a) of this section for the same calendar year (but not any subsequent calendar year).

(c) *Other royalty rates and terms.* This part 384 does not apply to persons or entities other than Licensees, or to Licensees to the extent that they make other types of ephemeral recordings beyond those set forth in paragraph (a) of this section. For ephemeral recordings other than those governed by paragraph (a) of this section, persons making such ephemeral recordings must pay royalties, to the extent (if at all) applicable, under 17 U.S.C. 112(e) or as prescribed by other law, regulation or agreement.

§ 384.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 384.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 384.3 and to distribute such royalty payments to each Copyright Owner, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced

by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners entitled to receive royalties under 17 U.S.C. 112(e) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 384.3(a) on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 384.3(b) by January 31 of the applicable calendar year, except that payment by a Licensee that has not previously made Ephemeral Recordings pursuant to the license under 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments.* A Licensee shall pay a late fee of 1.0% per month, or the highest lawful rate, whichever is lower, if either or both a required payment or statement of account for a required payment is received by the Collective after the due date. Late fees shall accrue from the due date until both the payment and statement of account are received by the Collective.

(f) *Statements of account.* For any part of the License Period during which a Licensee operates a Business Establishment Service, at the time when a minimum payment is due under paragraph (d), and by 45 days after the end of each month during the period, the Licensee shall deliver to the Collective a statement of account containing the information set forth in this paragraph (f) on a form prepared, and made available to Licensees, by the Collective. In the case of a minimum payment, or if a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall contain only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees directly to Copyright Owners, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all Ephemeral Recordings by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner entitled to a distribution of royalties under paragraph (g)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 384.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 384.5 Confidential information.

(a) *Definition.* For purposes of this section, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective or any other person or entity authorized to have access to Confidential Information pursuant to paragraph (d) of this section use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work require access to Confidential Information;

(2) Board members of the Collective, and members of the Collective committees whose primary functions are directly related to royalty collection and distribution, subject to an appropriate confidentiality agreement and for the sole purpose of performing their duties as board or committee members of the Collective, as applicable, provided that the sole Confidential Information that may be shared pursuant to this paragraph (d)(2) is Confidential Information contained in monthly statements of accounts provided pursuant to § 384.4(f) that accompany royalty payments;

(3) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 384.6 or on behalf of a Copyright Owner with respect to the verification of royalty distributions pursuant to § 384.7;

(4) Copyright Owners, including their designated agents, whose works have been used under the statutory license set forth in 17 U.S.C. 112(e) by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, provided that the sole Confidential Information that may be shared pursuant to paragraph (d)(4) of this section are monthly statements of account provided pursuant to § 384.4(f) that accompany royalty payments;

(5) In connection with future proceedings under 17 U.S.C. 112(e) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts; and

(6) In connection with bona fide royalty disputes or claims that are the subject of the procedures under § 384.6 or § 384.7, and under an appropriate confidentiality agreement or protective order, the specific parties to such disputes or claims, their attorneys, consultants or

other authorized agents, and/or arbitration panels or the courts to which disputes or claims may be submitted.

(e) *Safeguarding of Confidential Information.* The Collective and any person or entity identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective, person, or entity.

§ 384.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in

which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 384.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 384.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

EXHIBIT B

PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

§ 384.1 General.

(a) *Scope.* This part 384 establishes rates and terms of royalty payments for the making of Ephemeral Recordings by a Business Establishment Service, as defined in § 384.2(a), in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2014, through December 31, 2018~~2009-2013~~ (the "License Period").

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(c) shall comply with the requirements of that section, the rates and terms of this part and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees~~services~~ shall apply in lieu of the rates and terms of this part to the making of Ephemeral Recordings within the scope of such agreements.

§ 384.2 Definitions.

For purposes of this part, the following definitions shall apply:

Business Establishment Service means a service making transmissions of sound recordings under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv).

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the License Period, the Collective is SoundExchange, Inc.

Copyright Owners ~~are~~ is-a sound recording copyright owners who ~~are~~ is entitled to receive royalty payments made under this part pursuant to the statutory license under 17 U.S.C. 112(e).

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a Business Establishment Service that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a certified public accountant.

§ 384.3 Royalty fees for ephemeral recordings.

(a) *Basic royalty rate.* For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, ~~service pursuant to the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv).~~ a Licensee shall pay ~~12.5~~10% of such Licensee's "Gross Proceeds" derived from the use in such service of musical programs that are attributable to copyrighted recordings. "Gross Proceeds" as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(b) *Minimum fee.* Each Licensee shall pay a minimum fee of \$10,000 for each calendar year of the License Period in which it makes Ephemeral Recordings for use to facilitate transmissions under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), whether or not it does so for all or any part of the year. These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under paragraph (a) of this section for the same calendar year (but not any subsequent calendar year).

(c) *Other royalty rates and terms.* This part 384 does not apply to persons or entities other than Licensees, or to Licensees to the extent that they make other types of ephemeral recordings beyond those set forth in paragraph (a) of this section. For ephemeral recordings other than those governed by paragraph (a) of this section, persons making such ephemeral recordings must pay royalties, to the extent (if at all) applicable, under 17 U.S.C. 112(e) or as prescribed by other law, regulation or agreement.

§ 384.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 384.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 384.3 and to distribute such royalty payments to each Copyright Owner, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced

by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners entitled to receive royalties under 17 U.S.C. 112(e) that have themselves authorized such the Collective.

(ii) The Copyright Royalty Judges shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 384.3(a) on a monthly basis on or before by the 45th day after the end of each month for that month, except that if the Copyright Royalty Judges issue their final determination adopting these rates and terms after the commencement of the License Period, then payments due under § 384.3(a) for the period from the beginning of the License Period through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 384.3(b) by January 31 of the applicable calendar year, except that payment by:

~~(1) If the Copyright Royalty Judges issue their final determination adopting these rates and terms after the commencement of the License Period, then payment due under § 384.3(b) for 2009 shall be due 45 days after the last day of the month in which these rates and terms are adopted by the Copyright Royalty Judges and published in the FEDERAL REGISTER; and~~

~~(2) Payment for a Licensee that has not previously made Ephemeral Recordings pursuant to the license under 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.~~

(e) *Late payments.* A Licensee shall pay a late fee of 1.0-75% per month, or the highest lawful rate, whichever is lower, if either or both a required payment or statement of account for a required payment for any payment is received by the Collective after the due date. Late fees shall accrue from the due date until both the payment and statement of account are is received by the Collective.

(f) *Statements of account.* For any part of the License Pperiod ~~beginning on the date the Copyright Royalty Judges issue their final determination adopting these rates and terms and ending on December 31, 2013, during which a Licensee operates a Business Establishment Service, at the time when a minimum payment is due under paragraph (d), and by 45 days after the end of each month during the period, the Licensee shall deliver to the Collective a statement~~

of account containing the information set forth in this paragraph (f) on a form prepared, and made available to Licensees, by the Collective. In the case of a minimum payment, or if a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall contain only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person ~~individual or individuals~~ to be contacted for information or questions concerning the content of the statement of account;

(3) The ~~handwritten~~ signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or a corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, ~~if the Licensee is a corporation or partnership,~~ have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(g) Distribution of royalties~~payments~~. (1) The Collective shall promptly distribute ~~royalty payments~~ royalties received from Licensees directly to Copyright Owners, or their designated agents, that are entitled to such royalties. ~~The Collective~~ Provided that the Collective shall only be responsible for making distributions to those Copyright Owners or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient of such payments. The Collective shall distribute ~~royalties~~ payments on a basis that values all Ephemeral Recordings by a Licensee equally based upon the information provided under the by the Licensee pursuant to the regulations governing reports of use requirements for of sound recordings by Licensees contained in § 370.4 of this chapter. ~~Provided, however, that~~

~~Copyright Owners that authorize the Collective may agree with the Collective to allocate their shares of the royalty payments made by any Licensee among themselves on an alternative basis. Copyright Owners entitled to receive payments may agree with the Collective upon payment protocols to be used by the Collective that provide for alternative arrangements for the payment of royalties.~~

~~(h) Permitted deductions. The Collective may deduct from the payments made by Licensees under § 384.3, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(c)(3). Provided, however, that any party entitled to receive royalty payments under 17 U.S.C. 112(e) may agree to permit the Collective to make any other deductions.~~

(2) If the Collective is unable to locate a Copyright Owner entitled to a distribution of royalties under paragraph (g)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 384.8.

(h) Retention of records. Books and records of a Licensee and of the Collective relating to the payment, collection, and distribution of royalty payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 384.5 Confidential information.

(a) *Definition.* For purposes of this sectionpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision Collective shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective or any other person or entity authorized to have access to Confidential Information pursuant to paragraph (d) of this section use any Confidential Information for any purpose other than royalty collection and distribution and activities ~~directly-related~~ directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work, require access to Confidential Informationthe records;

(2) Board members of the Collective, and members of the Collective committees whose primary functions are directly related to royalty collection and distribution, subject to an appropriate confidentiality agreement and for the sole purpose of performing their duties as board or committee members of the Collective, as applicable, provided that the sole Confidential Information that may be shared pursuant to this paragraph (d)(2) is Confidential Information contained in monthly statements of accounts provided pursuant to § 384.4(f) that accompany royalty payments;

(3) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to ~~the verification of~~ a Licensee's ~~royalty payments statement of account~~ pursuant to § 384.6 or on behalf of a Copyright Owner with respect to the verification of royalty distributions pursuant to § 384.7;

(4) Copyright Owners, including their designated agents, whose works have been used under the statutory license set forth in 17 U.S.C. 112(e) by the Licensee whose Confidential Information is being supplied, ~~or agents thereof~~, subject to an appropriate confidentiality agreement, provided that the sole Confidential Information that may be shared pursuant to paragraph (d)(4) of this section are monthly statements of account provided pursuant to § 384.4(f) that accompany royalty payments;

(5) In connection with future proceedings under 17 U.S.C. 112(e) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts; and

(6) In connection with bona fide royalty disputes or claims that are the subject of the procedures under § 384.6 or § 384.7, and under an appropriate confidentiality agreement or protective order, the specific parties to such disputes or claims, their attorneys, consultants or other authorized agents, and/or arbitration panels or the courts to which disputes or claims may be submitted.

(e) *Safeguarding of Confidential Information.* The Collective and any person or entity identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the ~~such~~ Collective, person, or entity.

§ 384.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of ~~report~~ records.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit ~~and retain such records for a period of not less than 3 years.~~ The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 384.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of

intent to audit shall be served at the same time on the Collective. Any ~~such~~ audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners.

(d) *Acquisition and retention of ~~report/records~~*. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit ~~and retain such records for a period of not less than 3 years~~. The Copyright Owner requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure*. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation*. Before rendering a written report to a Copyright Owner, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure*. The Copyright Owner requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

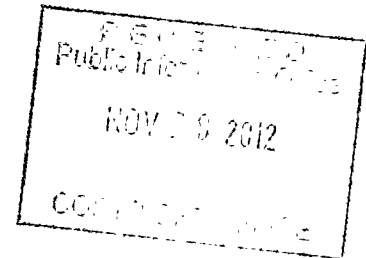
§ 384.8 Unclaimed funds.

If ~~the~~ a-Collective is unable to identify or locate a Copyright Owner who is entitled to receive a royalty distribution payment under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution payment. No claim to such distribution payment shall be valid after the expiration of the 3-year period. After ~~the~~ expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

November 29, 2012

BY HAND & ELECTRONIC MAIL

Copyright Royalty Board
Library of Congress
James Madison Memorial Building
101 Independence Avenue, SE.
Washington, DC 20559-6000



Re: Determination of Rates and Terms for Business Establishment Services
Docket No. 2012-1 CRB Business Establishments II


To Whom It May Concern:

I am pleased to inform you that all of the parties that filed Petitions to Participate (the "**Participants**") in the Determination of Rates and Terms for Business Establishment Services Docket No. 2012-1 CRB Business Establishments II (the "**Proceeding**"), have reached a voluntary settlement as to the rates and terms (the "**Rates and Terms**") to apply to business establishment services operating under the statutory license set forth in Section 112(e) of the Copyright Act, 17 U.S.C. § 112(e), for the rate period commencing January 1, 2014 and ending December 31, 2018 (the "**Period**").

Enclosed are an original, six (6) copies, and one (1) electronic copy in Portable Document Format (PDF) on compact disk of the Participants' Motion to Adopt Settlement (the "**Motion**") and the proposed Rates and Terms for the Period. **Exhibit A** to the Motion contains the Rates and Terms as proposed by the Participants and **Exhibit B** indicates the proposed edits to the existing regulations for business establishment services set forth at 37 C.F.R. Part 384.

Please date stamp the sixth copy of the Motion to Adopt and return it to the messenger making this hand delivery.

Sincerely,



Gary R. Greenstein

Enclosures

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

Copyright Royalty Board
November 28, 2012
Page 2

cc: C. Colin Rushing
Milton E. Olin, Jr.
Bruce Joseph
William Colitre
Paul Fakler
Todd Larson
Steve Englund